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**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

UTAH CHAPTER OF THE SIERRA CLUB,
et al.,

Petitioners,

Docket No. 2009-019
Cause No. C/025/0005

DIVISION OF OIL, GAS AND MINING,

Respondent, and

ALTON COAL DEVELOPMENT, LLC, and
KANE COUNTY, UTAH,

Intervenors-Respondents.

**PETITIONERS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR LEAVE TO
CONDUCT A SECOND SITE VISIT**

Pursuant to Utah Admin. Code § R641-108-900 and Rule 34(a)(2) of the Utah Rules of Civil Procedure, Utah Chapter of the Sierra Club ("Sierra Club"), Southern Utah Wilderness Alliance

(“SUWA”), Natural Resources Defense Council (“NRDC”), and National Park Conservation Association (“NPCA”)(collectively, “Petitioners”) have moved this Board for leave to issue notice of, and to conduct, a second inspection of the permit and adjacent area described in the coal mining permit at issue in this proceeding. This memorandum presents the factual background and legal arguments in support of Petitioner’s motion.

I.

Factual Background

From the outset, Petitioners have requested that their counsel and expert witness on hydrology and geomorphology be permitted to conduct an inspection of the permit and adjacent areas identified in the Coal Hollow mine permit that the Division of Oil, Gas and Mining (“the Divison”) approved based on the application of Alton Coal Development, LLC (“ACD”). When an early December snowfall rendered the site inaccessible, Petitioners withdrew their initial request for leave to conduct their inspection on December 10 through 12, 2009, without prejudice to renewal of their request at a later date.

The parties subsequently stipulated that Petitioners would have the right to inspect the site between February 16, 2010, and March 5, 2010, subject to this Board’s approval of the stipulation and subject as well to Petitioners’ reservations that all of their objectives could be accomplished under available site conditions. Due to the snow cover that then existed at the mine site, Petitioners expressly reserved the right to request a follow up visit either informally or through a Board Order for Discovery. The Board approved the parties’ stipulation concerning Petitioners’ initial site visit and other discovery.

On March 2, 2010, Petitioners' representatives attempted to inspect the ACD mine site. *Second Declaration of Elliott W. Lips* at 1.¹ Their primary purposes were to (1) inspect and photograph ACD's baseline hydrologic monitoring stations in order to verify location, geologic occurrence, association or lack of association with other water resources, or other information ACD reports for these monitoring stations, and (2) inspect, survey, photograph, and collect samples of surface geomorphic features pertaining to the existence of alluvial valley floors. *Id.* at 1-2.

Petitioners began their attempted inspection at the town of Alton, Utah, where they were met by Jay Adams, who identified himself as ACD's representative. *Id.* at 2. Mr. Adams created a video recording of portions (but not all) of the activities of Petitioners' representatives during the attempted inspection.² No other representatives of ACD or personnel from the Division were present during the attempted inspection. *Id.*

Petitioners observed and learned that County Road 136 from the town of Alton to the proposed Coal Hollow permit area had been recently cleared of snow. *Id.* However, none of the roads taking off of the County road that would have provided access to outlying portions of the permit and adjacent areas had been cleared. *Id.* Petitioners' representatives measured snow depth at various locations in the permit and adjacent area by excavating eight snow pits near the County road. *Id.* Average snow depth, as measured in the eight snow pits, was 24.3 inches. *Id.* Snow depth ranged between 21 inches and 28.5 inches. *Id.*

¹ Petitioners attach as Exhibit 1 to this memorandum a copy of the Second Declaration of Elliott W. Lips.

² Petitioners intended to attach as an exhibit to this memorandum a copy of the DVD that the parties' approved discovery stipulation requires ACD to provide to Petitioners. Petitioners understand that weather or other factors beyond ACD's control prevented the company from providing the DVD prior to the filing of this motion. Accordingly, Petitioners intend to amend this memorandum by adding the DVD as an exhibit as soon as ACD provides the DVD to them.

From the County road Petitioners' representatives were able to see across Sink Valley into the permit and adjacent area for a distance of at least one mile. *Id.* The land surfaces in Sink Valley within view from the County road were entirely covered with snow. *Id.* The only portions of ACD's permit and adjacent area that were not entirely covered with snow were (1) the steep or vertical banks of Lower Robinson Creek observed in proximity to monitoring station SW-101, which were 60 to 80 percent covered with snow, (2) the steep or vertical banks of Sink Valley Wash observed in proximity to monitoring station SW-9, which were 60 to 70 percent covered with snow; and (3) isolated patches in the understory of the pinon and juniper trees. *Id.*

The entire channel bottoms of Lower Robinson Creek observed in proximity to SW-101 and of Sink Valley Wash in proximity to SW-9 were covered with snow. *Id.* at 3. Any marker indicating the location of monitoring station SW-101 was likely covered with snow. *Id.* Petitioners' representatives excavated a snow pit in the lowest portion of snow in Lower Robinson Creek in the area where ACD reports the location of SW-101 (east of the County road); snow depth at this location was 28 inches. *Id.* The banks of Lower Robinson Creek west of the County road and Sink Valley Wash near monitoring station SW-9 were covered with loose unstable soils, caving snow, and overhanging cornices of drifted snow. *Id.*

Based on the conditions just described and others evident in the photographs attached to the *Second Declaration of Elliott W. Lips*, Petitioners' representatives determined that the stream channels on site were unsafe to access or traverse. *Id.* Despite good faith efforts to access ACD's mine site, the site conditions described above prevented Petitioners' representatives from conducting the site inspection and accomplishing their stated objectives. *Id.* Even if Petitioners' representatives had accessed outlying portions of the permit and adjacent area by snow shoeing several miles, the monitoring stations and pertinent topographic, geologic, geomorphic, and hydrologic features would

not have been observable. *Id.* In order to accomplish the reasonable objectives of a site visit, it is necessary for the site to be fully observable and inspectible. *Id.*

II.

Petitioners Are Entitled to Enter and Inspect ACD's Permit Area and Adjacent Area At a Time When Site Conditions Do Not Preclude Inspection of Features Important to Resolution of the Issues in This Proceeding

As Petitioners have pointed out in prior argument on the issue of inspecting ACD's permit and adjacent area, Rule 34(a)(2) of the Utah Rules of Civil Procedure authorizes a party to request that any other party permit entry on land so that the requesting party may inspect, measure, survey, photograph, test, or sample the property. Inspection of ACD's permit area and adjacent area by Petitioners' counsel and consultant on geology and hydrology is necessary to enable Petitioners' counsel and consultant to develop a reasonably equivalent familiarity with the subject lands as counsel, consultants, and scientific employees of the Division and ACD have developed or have the unfettered capability to develop. Access to inspect the permit and adjacent areas is necessary so that (a) Petitioners' counsel may effectively present Petitioners' evidence and formulate cross-examination of adverse witnesses, (b) Petitioners may avoid surprise at the evidentiary hearing in this matter, and (c) Petitioners' consultant may formulate and present his intended testimony in light of personal observation of the lands in question rather than solely on the basis of reviewing documents and visiting the site when the critical features there were made inaccessible under two feet of snow. Petitioners' inspection of the areas at issue is also necessary to enable Petitioners' consultant to verify or detect error in the various geological and hydrological data or analyses that ACD has submitted and that the Division has approved with respect to ACD's permit application.

Through no fault of any party, snow cover rendered the great majority of ACD's permit and adjacent areas inaccessible during the agreed discovery time window. *Second Declaration of Elliott W. Lips*. Even at those points on the permit or adjacent areas which lay adjacent to the plowed county road, snow cover prevented the location of markers and monitoring stations themselves. *Id.* Most importantly, the snow cover prevented Petitioners' consultant from assessing the very land features that witnesses for the Division and ACD described in deposition testimony as important or dispositive in their assessment whether Sink Valley is an alluvial valley floor. For all the reasons specified in the *Second Declaration of Elliott W. Lips*, Petitioners require a second site inspection at time when there is no snow cover or other condition obstructing achievement of the purposes of Petitioners' inspection.

Authorizing Petitioners' request for a second inspection would not prejudice the rights of any party or to this proceeding. As previously agreed in the parties' approved discovery stipulation, Petitioners will conduct a minimally intrusive inspection. Furthermore, based on information and belief, ACD's permit has not yet issued and therefore no surface coal mining and reclamation operations have yet occurred on the area that Petitioners seek to inspect. Indeed, the Air Quality Board has not yet acted on ACD's air quality permit application, and a further delay of several months seems likely before the Air Quality Board will act. Finally, Petitioners are informed, believe, and therefore assert that the U.S. Army Corps of Engineers has indicated to ACD that it will investigate the status of potential wetlands on ACD's permit area and then determine whether that agency has jurisdiction of ACD's proposed operations and whether ACD must obtain a permit before conducting any surface coal mining operations in Coal Hollow. Petitioners are further informed, believe, and therefore assert that the Corps has determined that it will not begin its jurisdictional investigation until ACD's permit area is completely free of snow cover. For all these

reasons, the delay necessary to accommodate Petitioners' need to conduct a second site inspection will not in any way prejudice ACD's ability to commence operations as soon as legally permissible.

Before eventually agreeing to permit Petitioners' March 2, 2010, inspection, ACD opposed Petitioners' earlier request for entry on ACD's permit area and parts of the related "cumulative impact area." ACD's opposition papers identified no impairment of its own interests that Petitioners' inspection, measurement, or testing of these areas might cause. In light of the parties' approved discovery stipulation, certain of ACD's grounds for opposing Petitioners' initial inspection requests no longer apply or are waived. However, to the extent that ACD may reassert opposition based on its asserted interest in resolving this permit challenge at the earliest practicable date, Petitioners hereinafter reassert their fundamental interest in conducting a meaningful site inspection.

To begin with, the "contention that a showing of need is a prerequisite for an order to compel inspection is incorrect." *Cuno Inc. v. Pall Corp.*, 116 F.R.D. 279, 281 (E.D.N.Y. 1987) (construing Rule 34(a)(2) of the Federal Rules of Civil Procedure). Indeed, "inspections are not an extraordinary means of discovery" – a party requesting inspection need only show that the inspection is relevant to the proceeding at hand, and an inspection that pertains to the processes in question meets the relevance standard. *Id.*

Even if the sole object of Petitioners' inspection request was to obtain evidence that either counters ACD's hydrologic baseline data or exposes error in the conclusions that ACD and the Division drew in preparing and approving the permit application, Petitioners' requested inspection would meet the relevance standard because **that** purpose of the inspection is plainly meant to produce evidence to meet Petitioners' burden of proving error in the Division's approval of ACD's permit application.

Indeed, ACD's response to Petitioners' request for agency action asserts that Petitioners bear the burden of proving at least two matters that require inspection of the permit area. First, after arguing that "the Division correctly determined that no flood plains or streams terrace deposits characteristic of AVF's were identified in the project area" and noting that "[t]his finding was confirmed by the Division **in field examinations of the mine site** conducted on October 1, 2, 2008 (*sic*)," ACD Response at 5 (emphasis supplied), ACD asserts that "Petitioners have failed to refute the Division's AVF determination with any credible evidence or data contradicting the Division's findings." *Id.* Second, ACD insists that "Petitioner (*sic*) must present evidence, if it has any, regarding the extent of aquifers affected by mining operations to satisfy its burden of proof on [the CHIA] issue." ACD Response at 13. Although Petitioners do not agree that they have an affirmative burden to produce the evidence ACD demands, the company's argument and prudent management of this litigation compel Petitioners to conduct an investigation of the permit area for the purpose of developing proof on these issues rather than simply rest on the Division's prior positive AVF determination.

In addition, ACD's response to Petitioners' request for agency action asserts that "some monitoring sites are not configured to retrieve samples for analysis." ACD Response at 4. Petitioners are entitled to investigate this admission and to evaluate, on the ground, the effect that including such dysfunctional monitoring sites had on ACD's baseline hydrologic data collection program.

Finally on this score, ACD's argument that "placement of sampling stations downstream from the project, should be decided based upon evidence supporting or refuting Petitioners' claim that 'good scientific practice' requires such monitoring," ACD Response at 6, underscores that Petitioners' access to the permit area and controlled portions of the cumulative impact area for

development of evidence may prove critical in this litigation. Against that backdrop, to argue that Petitioners have the burden of producing evidence that can only come from physical investigation of the permit and adjacent areas, while at the same time opposing Petitioners' access to those areas, is to argue for a fatally flawed proceeding that denies due process and fails to receive all the evidence that Congress and the Utah legislature meant this Board to consider in permit review proceedings.

Apart from the development of counter-evidence, however, Petitioners request access to the mine site for a more fundamental reason. Petitioners' attorneys and experts require access to the mine site to develop an understanding of the data, studies, and conclusions contained in the administrative record which is reasonably equivalent to the understanding that ACD's attorneys and experts have developed through the unfettered access that ACD has provided them. An attorney or scientific expert who has an opportunity to observe a mine site personally at a time when the site is open to observation of its important features is certainly better able to perceive the strengths and weaknesses of the conclusions concerning that site that are stated in the administrative record.

After all, the administrative record is largely a controlled presentation shaped by ACD and, to a lesser extent, by the Division. Accordingly, a site inspection during discovery in this proceeding is the only opportunity that Petitioners, their attorneys, and their scientific experts would have (1) to gain an understanding of the administrative record equivalent to that of their counterparts and (2) to test the accuracy and completeness of the data and conclusions presented in the permit application. To deprive them of that opportunity would substantially impair the search for truth in this proceeding as well as Petitioners' ability to prepare their case in a competent, professional manner. *See Eirhart v. Libby-Owens-Ford Co.*, 93 F.R.D. 370, 371 (N. D. Ill. 1981) (compelling inspection to allow observation of defendant's controlled experiment because plaintiffs would be

“far better able to treat with the offered test findings if they have been able personally to observe the manner in which the test is conducted”).

Indeed, courts have frequently admonished attorneys who fail to conduct site visits during discovery in cases where the condition of premises is at issue. As the United States Court of Appeals for the Seventh Circuit observed in a recent premises liability case:

The record contains no picture of the fryer or even identification of the brand or model. The plaintiff's lawyer told us that he could not gain access to the restaurant to look at the fryer and hood, which is absurd; hasn't he heard of pretrial discovery? (See Fed.R.Civ.P. 34(a)(2).) Well, maybe not, because he conducted no discovery at all. As a result, nothing is known about the source of the crack in the globe, or, if the globe was already broken when the plaintiff's arm touched it, the cause of its being broken. The globe could have been defectively designed by the manufacturer, defectively installed or manhandled by the manufacturer of the fryer hood, damaged in shipment, damaged by an employee of the restaurant, damaged by another employee of the plaintiff's company or by the plaintiff himself on a prior visit to clean the hood. We shall never know.

Torrez v. TGI Friday's, Inc., 509 F.3d 808, 810 (7th Cir. 2007); *see also Mesman v. Crane Pro Services*, 409 F.3d 846, 850 (7th Cir. 2005) (noting that a defendant's refusal to allow plaintiff's expert to inspect an industrial plant did not preclude the grant of a new trial “since the plaintiffs could easily have obtained an order directing [the defendant] to allow the visit”); *Albany Bank & Trust Co. v. Exxon Mobil Corp.*, 310 F.3d 969, 974 (7th Cir. 2002) (noting that “Now that the litigation is underway, assuming Exxon still wishes to inspect the land for contamination, Albany **will have to permit entry** during discovery under Fed. R. Civ. P. 34(a)(2)”) (emphasis supplied).

ACD has failed to show that the request will cause the company “annoyance, embarrassment, oppression, or undue burden or expense” – and those are the only reasons that the governing rule recognizes for entry of a protective order. A simple visit by professionals and two lay representatives to ACD's currently undeveloped permit area would not interfere in any respect with the activities that ACD may lawfully conduct on that land at present. Moreover, permittees of coal

mines are by law subject to random inspection by a host of federal and state regulators, as well as by citizens who accompany those inspectors in certain circumstances. The notion that the limited inspection that Petitioners request is unduly onerous lacks any degree of merit.

ACD cites no support for its implicit contention that Petitioners must first identify defects in the administrative record before conducting their requested site visit. As stated earlier, the purposes of the site visit are (1) to develop better understanding of the written descriptions and analyses presented in the administrative record and (2) to identify any deficiencies in the administrative record that personal observation may disclose. ACD's prior opposition papers incongruously asked this Board to deny access to the mine site because Petitioners do not yet fully know whether a personal observation of the property will reveal deficiencies in the permit application or precisely what those deficiencies might be. The very purpose of discovery is to answer the questions on which ACD's opposition rests; it would make no sense to deny discovery because Petitioners don't yet have all of the answers.

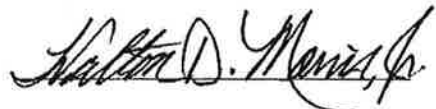
Conclusion

For the reasons stated above and in prior memoranda on the inspection issue in this proceeding, Petitioners urge the Board to grant them leave to issue notice of, and to conduct, a second inspection of ACD's permit and adjacent area at such future time as that land becomes free of snow cover and any other condition that may obstruct achievement of Petitioners' purposes in inspecting the site.

Dated: March 10, 2010

Respectfully submitted,

By:



Attorneys for Utah Chapter of the
Sierra Club, *et al.*

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of March 2010, I served a true and correct copy of **PETITIONERS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR LEAVE TO CONDUCT A SECOND SITE VISIT** to each of the following persons via e-mail transmission and United States first-class mail, postage pre-paid:

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EXHIBIT 1

Petitioners' Motion for Leave to Conduct Second Site Visit

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

UTAH CHAPTER OF THE SIERRA CLUB,
et al.,

Petitioners,

Docket No. 2009-019
Cause No. C/025/0005

DIVISION OF OIL, GAS AND MINING,
Respondent, and

ALTON COAL DEVELOPMENT, LLC, and
KANE COUNTY, UTAH,
Intervenors-Respondents.

SECOND DECLARATION OF ELLIOTT W. LIPS

I, Elliott W. Lips, am of over twenty-one years of age, of sound mind, capable of making this declaration, and I am personally acquainted with the facts herein stated. If sworn as a witness, I could testify to the facts and opinions stated in this declaration. I declare under penalty of perjury that the following is true and correct.

1. I am currently a principal engineering geologist of Great Basin Earth Science, Inc., located in Salt Lake City, Utah.
2. I am a Professional Geologist licensed in the State of Utah.
3. I have been retained as Petitioners' consultant on geologic and hydrologic issues related to Alton Coal Development LLC's (ACD's) proposed Coal Hollow Mine.
4. I am familiar with the geology and hydrology portions of the permit application package (PAP) submitted by ACD for the Coal Hollow Mine. I have also reviewed significant portions of the engineering section of the PAP relating to hydrology issues.
5. I am familiar with the Utah Division of Oil, Gas and Mining (Division) application approval and decision documents (Technical Analysis [TA] and Cumulative Hydrologic Impact Assessment [CHIA]) dated October 15, 2009 for the Coal Hollow Mine.
6. On March 2, 2010 I attempted to conduct a site visit of the proposed Coal Hollow Mine permit and adjacent area.
7. The purposes of my site visit were to: 1) inspect and photograph ACD's baseline hydrologic monitoring stations in order to verify location, geologic occurrence, association or

lack of association with other water resources, or other information ACD reports for these monitoring stations; and 2) inspect, survey, photograph, and collect samples of surface geomorphic features as pertaining to Alluvial Valley Floors.

8. In order to accomplish these objectives it is necessary for the site to be entirely free of snow and fully observable and inspectable.

9. The attempted site visit began in the town of Alton where I was met by Jay Adams, who identified himself as ACD's representative.

10. No other representatives of ACD, or personnel from the Division, were present during the attempted site visit.

11. I was accompanied during the entire attempted site visit by Tiffany Bartz, attorney for Petitioners.

12. Mr. Adams created a video recording of portions (but not all) of my activities during the attempted site visit.

13. County Road 136 from the town of Alton to the proposed Coal Hollow permit area had been recently cleared of snow.

14. A Kane County equipment operator informed me later in the day that clearing of the County road began on the previous day.

15. None of the roads taking off of the County road that would have provided access to the permit and adjacent area were cleared of snow.

16. Snow depth at various locations in the permit and adjacent area was measured and recorded by excavating eight snow pits near the County road.

17. The average snow depth, as measured in the eight snow pits was 24.3 inches, ranging between 21 and 28.5 inches.

18. From the County road I was able to see across Sink Valley into the permit and adjacent area for a distance of at least one mile.

19. The land surfaces in Sink Valley within my field of view from the County road were entirely (100 percent) covered with snow (see Photographs 1 through 4 in Attachment A).

20. The only portions of the permit and adjacent area in Sink Valley that were not entirely covered with snow were: 1) the steep to vertical banks of Lower Robinson Creek observed in proximity to SW-101, which were 60 to 80 percent covered with snow; 2) the steep to vertical banks of Sink Valley Wash observed in proximity to SW-9, which were 60 to 70 percent covered with snow; and 3) isolated patches in the understory of the pinon and juniper trees.

21. The entire channel bottoms of Lower Robinson Creek observed in proximity to SW-101 and Sink Valley Wash in proximity to SW-9 were covered with snow.

22. I did not observe a marker indicating the location of monitoring station SW-101; if one was present it was likely covered with snow.

23. A snow pit was excavated in the lowest portion of snow covering the channel in Lower Robinson Creek in the area where ACD reports the UTM location of SW-101 (east of the County road); snow depth at this location was 28 inches (see Photograph 5 in Attachment A).

24. The banks of Lower Robinson Creek west of the County road, and Sink Valley Wash near SW-9 were covered with loose unstable soils, caving snow, and overhanging cornices of drifted snow.

25. I determined that these conditions rendered the channels unsafe to access and/or traverse.

26. Site conditions, as described above, prevented me from conducting the site visit and accomplishing the stated objectives.

27. In my opinion, the site was not inspectable.

28. Even if access to additional locations had been gained by snow shoeing several miles, the monitoring stations and the topographic, geologic, geomorphic, and hydrologic features of Sink Valley would not have been observable.

29. In order to conduct a meaningful site visit and accomplish the above stated objectives, it is necessary for the site to be entirely free of snow and fully observable and inspectable.

Pursuant to Utah Code § 78B-5-705, I declare under penalty of perjury, that the foregoing is true and correct.

Signed on this 9th day of March, 2010, in Salt Lake City, Utah.



ATTACHMENT A

PHOTOGRAPHS



Photograph 1. View of permit area west of County Road 136. Photograph taken on March 2, 2010, 80 feet west of County Road 136 at UTM NAD27 12 371268 4149850 near center of permit area. View to west. Snow depth at this location was 28.5 inches.



Photograph 2. View of permit area east of County Road 136. Photograph taken on March 2, 2010, 65 feet east of County Road 136 at UTM NAD27 12 371268 4149850 near center of permit area. View to north. Snow depth at this location was 24 inches.



Photograph 3. View of permit area east of County Road 136. Photograph taken on March 2, 2010, 65 feet east of County Road 136 at UTM NAD27 12 371268 4149850 near center of permit area. View to east across Sink Valley. Snow depth at this location was 24 inches.



Photograph 4. View of permit area east of County Road 136. Photograph taken on March 2, 2010, 60 feet east of County Road 136 at UTM NAD27 12 371261 4138842 near southern part of permit area. View to east across Sink Valley towards Swapp Hollow. Snow depth at this location was 28 inches.



Photograph 5. Lower Robinson Creek in the area where ACD reports the location of SW-101. Photograph taken on March 2, 2010 at UTM NAD27 12 371299 4140305. View to east. Snow depth at this location was 28 inches.



Photograph 1. View of permit area west of County Road 136. Photograph taken on March 2, 2010, 80 feet west of County Road 136 at UTM NAD27 12 371268 4149850 near center of permit area. View to west. Snow depth at this location was 28.5 inches.



Photograph 2. View of permit area east of County Road 136. Photograph taken on March 2, 2010, 65 feet east of County Road 136 at UTM NAD27 12 371268 4149850 near center of permit area. View to north. Snow depth at this location was 24 inches.



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Photograph 4. View of permit area east of County Road 136. Photograph taken on March 2, 2010, 60 feet east of County Road 136 at UTM NAD27 12 371261 4138842 near southern part of permit area. View to east across Sink Valley towards Swapp Hollow. Snow depth at this location was 28 inches.



Photograph 5. Lower Robinson Creek in the area where ACD reports the location of SW-101. Photograph taken on March 2, 2010 at UTM NAD27 12 371299 4140305. View to east. Snow depth at this location was 28 inches.